Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application for Transfer of Control of WCS Licenses	)	
from WCS Wireless, Inc., Transferor,	)	**WT Docket No. 05-256** **File No. TC-0002240823**
to XM Satellite Radio Holdings, Inc., Transferee.	)	

REPLY
OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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August 24, 2005

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Pursuant to 47 C.F.R. §§ 1.939, 1.948(j) and 47 U.S.C. § 309, the National Association of Broadcasters ("NAB") respectfully submits this reply to the oppositions of WCS Wireless, Inc. ("WCS Wireless") and XM Satellite Radio Holdings, Inc. ("XM") (collectively, "Applicants") to NAB's petition to deny the above-captioned application for transfer of control.

INTRODUCTION AND SUMMARY

The oppositions confirm what NAB stated in its petition to deny: XM has not provided sufficient information to carry its burden of proof to show that the transfer of these licenses will serve the public interest. As NAB showed in its petition, WCS Wireless appears to be violating the Commission's trafficking rules. And XM's own statements strongly suggest that it plans to use the WCS licenses in ways that are not consistent with the Commission's orders and policies. Now that the Commission has removed this application from streamlined consideration, it can and should require the Applicants to provide the information necessary to meet their legal obligations and consider the many novel policy issues this application presents.

Based on the current record, the Commission should deny the application. At a minimum, even if the Commission eventually receives adequate information and determines that this transaction actually is in the public interest, it should impose appropriate conditions to ensure that XM does not circumvent the Commission's previous SDARS and WCS orders.

The various objections that XM and WCS Wireless raise do not compel a different outcome. As an initial matter, the Applicants misapprehend the law and the facts by claiming that NAB lacks standing. NAB's standing here is incontrovertible. NAB, which has participated in countless Commission proceedings on behalf of its broadcaster members, described in detail in its petition how the transaction would threaten the interests of its radio station members and the free, local public services they provide. The fact that other companies (or the Applicants themselves) could harm NAB members outside this transaction is legally irrelevant. And the Applicants admit that this transaction is different from a joint venture.

WCS Wireless does nothing to overcome the evidence that it is engaged in trafficking. It offers no response to many of the facts NAB pointed out in its petition, most notably that WCS Wireless bought half of the relevant licenses only four months ago. And the meager "development efforts" it could muster — mainly a test with XM to evaluate interference between the frequencies that XM hopes to deploy together — serve only to confirm that it bought the licenses primarily for resale and, hence, speculation.

Finally, XM's filing only underscores the need for the Commission to make good on its promise to "monitor the situation" with SDARS development and "take any action necessary to safeguard the important public service that terrestrial radio provides." The scant information XM has provided strongly suggests that it plans to provide localized services integrated with its

SDARS service in a manner likely to harm terrestrial radio — and hence the important public benefits it provides. NAB urges the Commission to take action as it promised.

ARGUMENT

I. NAB'S STANDING IS CLEAR AND DOCUMENTED.

NAB's standing here is uncontestable. As the Commission (and the Applicants) well know, NAB is the leading trade association that promotes and protects the interests of radio, and NAB has participated in nearly all the Commission's proceedings addressing broadcast-related issues, including the three major prior proceedings discussed in its petition to deny. In its petition, NAB detailed over nearly twenty pages how its members would be harmed if XM acquired these licenses in violation of Commission law or policy. Such a transfer would threaten the viability of terrestrial radio by allowing XM to circumvent the regulations and policies the Commission has established to balance the competing concerns of satellite and terrestrial radio providers. It is difficult to think of a more concrete injury. WCS Wireless's claim that NAB has made only "bare allegations" thus defies the record.[1/]

In an effort to avoid the merits, the Applicants present a law of standing that does not exist. Their argument that the license transfer must be the "sole" cause of any injury to NAB, for example, stands the law on its head.[2/] Standing requires that the relief sought would alleviate a *particular* injury from a party, not that it would alleviate *all* injuries from all parties.[3/]

[1/] WCS Wireless Opposition at 10.

[2/] XM Opposition at 5; WCS Wireless Opposition at 9-10.

[3/] For example, in *Sierra Club v. Morton*, 405 U.S. 727 (1972) (cited by WCS), the plaintiffs lacked standing because the organization had not even alleged that its members would be adversely affected by the government's approval of a Disney resort in the Sierra mountains. The Court did not hold that the plaintiffs lacked standing because Disney might find *another* way

According to the Applicants, no party would ever have standing — in license transfers and nearly every other case — because the challenged party and other parties could always harm it in other ways. This is not the law.

Similarly, the Applicants' claim that no party has standing because XM and WCS Wireless themselves could inflict the same harm in a different way (a joint venture) is doubly wrong. Just as the possibility of harm from other sources does not defeat standing, a party is not powerless to challenge the method in which a party proposes to harm it, simply because the party could possibly harm it in other ways. In any event, both XM and WCS Wireless have admitted that this transaction is different from (and more effective than) a joint venture.[4/]

In fact, the Applicants' own cases make clear that they have categorically misstated the law of standing. For example, in *Americatel Corporation*, the Commission held that AT&T *had* standing to consider a challenge to a license transfer.[5/] The Commission explained there that "AT&T alleges that if this application is granted without certain conditions being met, [the acquiring parties] will be able to market . . . telecommunications services [that will give them] an

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to build the resort even absent government approval — or that some *other* company might build a resort there.

[4/] XM Opposition at ii ("WCS Wireless could deploy the same facilities and offer the same services (*albeit probably in a less expeditious fashion*).") (emphasis added); WCS Wireless Opposition at ii ("The merger simply makes the process more efficient.").

[5/] Memorandum Opinion, Order, Authorization and Certificate, *AmericaTel Corporation*, 9 FCC Rcd 3993, 3995 ¶ 10 (1994) ("*AmericaTel Order*"). The other cases the parties cite (without any discussion of their facts or holdings) deal with situations so far removed from this one that they prove NAB's point. *See, e.g.*, Order, *Applications of Alaska Native Wireless*, 18 FCC Rcd 11640, 11645 ¶ 12 (2003) (no standing to challenge auction where party did not even bid in the auction); Memorandum Opinion and Order, *Application of MCI Communications Corp.*, 12 FCC Rcd 7790, 7797 ¶ 19 (1997) (no standing over "a private, contractual claim"); Order, *Minnesota PCS Limited Partnership*, 17 FCC Rcd 126, 128 ¶ 7 (2002) (no standing for late, miscaptioned petition where "alliance" that "claims to represent the interests of wireless consumers nationwide" made only cursory allegations regarding consumer harm).

unfair competitive advantage."[6/] As a result, the Commission concluded that "as a potential competitor . . . alleging potential economic injury, AT&T has standing to petition to deny . . . the . . . application."[7/] So too here.

In sum, NAB's standing here is plain and documented in the record.

II. WCS WIRELESS HAS DONE NOTHING TO OVERCOME THE EVIDENCE THAT IT IS TRAFFICKING.

In its Opposition, WCS Wireless offers nothing but further support for the conclusion that it is engaged in trafficking. The Commission's rules prohibit a party from "obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public or for the licensee's own private use."[8/]

WCS Wireless has offered nothing to dispel the observation that it is involved in rank speculation. Most notably, WCS Wireless plays ostrich with the fact that it has held half of these licenses *for only four months*.[9/] WCS Wireless offers no explanation for its decision to flip half of its inventory of licenses in such a short time. The rules allow for a finding of no trafficking if a party demonstrates "that the proposed assignment is due to changed circumstances (described in detail) affecting the licensee after the grant of the authorization, or that the proposed

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6/ *AmericaTel Order* at 3995 ¶ 10.

7/ *Id*.

8/ 47 C.F.R. § 1.948(i).

9/ These include KNLB208, KNLB302, KNLB303, KNLB304, KNLB305, KNLB306, KNLB307, and KNLB308. *See* Application for Assignments of Authorization and Transfers of Control (Form 603), File No. 0002064363 (submitted Mar. 2, 2005).

assignment is incidental to a sale of other facilities or a merger of interests."[10/] WCS Wireless has now had the opportunity to explain its "changed circumstances (described in detail)" to justify its decision to sell these licenses rather than provide services with them. But it has not done so. Instead, WCS Wireless argues only that it has engaged in *de minimis* "development" efforts and that the trafficking rules do not apply. Both these claims are wrong.

As a threshold matter, WCS Wireless's "development efforts" do not alone determine whether it has engaged trafficking. The issue is whether the licenses were purchased for the purpose of speculation and profitable resale rather than "the provision of telecommunications service to the public."[11/] Here, despite having the chance to supply evidence to the contrary, WCS Wireless offers no reason to believe it ever meant to provide telecommunications service to the public.

The meager evidence of "development" that WCS Wireless does provide only confirms that WCS Wireless is attempting to engage in trafficking. Of the four examples WCS Wireless offers in its opposition, two involve no more than having discussions with Commission staff.[12/] The other two efforts are an expanded way of describing one activity — applying for and conducting a "test" in Dallas.[13/] Although WCS Wireless provides no detail or substantiation for

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[10/] 47 C.F.R. § 1.948(i).

[11/] *Id*. WCS Wireless has not suggested (nor could it) that it purchased these licenses "for its own private use," the other acceptable reason for a license acquisition.

[12/] WCS Wireless Opposition at 12. The "further listing" of "developmental actions" in the declaration WCS Wireless provides adds only that it has been working on its "business plans" and "business models." Donohue Decl.

[13/] WCS offers its pending waiver application as an excuse for not engaging in "further development." WCS Wireless Opposition at 13. But WCS Wireless did not even file the waiver application until April of this year, even though some of its licenses were obtained in 2003. And NAB has not, as WCS Wireless contends, opposed the waiver application. *Id*.

this test, investigation reveals that WCS Wireless conducted a test in late 2004, with XM, to study the interference effects between WCS transmissions and XM's SDARS operations.[14/] XM assisted WCS Wireless in testing how well these licenses could be combined not long before XM agreed to buy the WCS licenses (for the purpose of combining WCS operations with its SDARS operations). In other words, WCS Wireless's primary "development efforts" were apparently aimed at facilitating its sale to XM.[15/]

No doubt aware that its arguments fail under the Commission's trafficking rules, WCS Wireless also attempts to claim these rules do not apply.[16/] Its contentions are wrong. First, WCS Wireless's argument that the *unjust enrichment* rules are designed to protect against profiting through auctions is a red herring.[17/] The Commission's trafficking rules are separate from the unjust enrichment rules, and NAB does not contend WCS Wireless violated the unjust enrichment rules.

Second, WCS Wireless's argument that the trafficking rules do not apply to auctioned licenses is also incorrect. The forbearance decision WCS Wireless cites *declined* to forbear from applying the trafficking rules to auctioned licenses.[18/] In any case, the Commission's statements

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[14/] *See* Application of WCS License Subsidiary, LLC (Form 442), FCC Experimental Construction Permit and License, File No. 0205-EX-PL-2004, Granted Nov. 3, 2004 (Excerpts attached as Exhibit A).

[15/] Coordination of these efforts was no doubt facilitated by the fact that Columbia Capital Equity Partners is a major investor in both XM and WCS Wireless. *See* http://www.colcap.com/portfolio/communications_service.html (last visited August 22, 2005).

[16/] WCS Wireless Opposition at 10-12.

[17/] *Id*. at 11 (citing *Cingular Wireless, LLC*, 19 FCC Rcd 2570 (2004)).

[18/] First Report and Order, *Forbearance From Applying Provisions of the Communications Act to Wireless Telecommunication Carriers*, 15 FCC Rcd 17414, 17429 ¶ 33 (2000).

that auctions may lessen the need for the Commission's trafficking rules is inapplicable here since WCS Wireless did *not* buy the licenses at auction.[19/]

The fact that "[n]o money is changing hands" in this transaction is likewise irrelevant.[20/] A party can cash in on its speculation through a stock transaction, of course, just as readily as through a cash sale. And, contrary to WCS Wireless's claims, the fact that its deal is a stock transaction does not make it "similar" to the Sprint/Nextel merger.[21/] The trafficking rules provide an exception when licenses are "incidental to a sale of other facilities or a merger of interests."[22/] This was the case in the Sprint/Nextel merger, a multi-billion dollar deal to sell a larger business (Nextel) with its extensive facilities to Sprint. But, aside from its bald (and implausible) assertion that the deals are "similar," WCS Wireless does not even try to contend that the licenses are merely incidental to a sale of facilities or even that any substantial interests are involved other than the licenses. XM is buying nothing but a shell company formed to hold naked licenses, and it is difficult to imagine what has changed in the past four months, especially

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19/ *Id*. The Commission's statement that paying market value for licenses will "effectively safeguard against such speculation" is also incorrect as a matter of basic economics. Parties purchase assets at market value for the purpose of speculation all the time. They are simply hoping the market value will increase. Real estate, an asset frequently compared to spectrum, provides a classic example where speculators have purchased at market value, made no improvements and put the property to no productive use, but instead held the property for a later "profitable resale." *Cf. Fresno Mobile Radio v. FCC*, 165 F.3d 965, 969 (1999) (rejecting FCC's contention that auction winners would be less likely to warehouse spectrum than a licensee that received its license for free "as a foolish notion that should not be entertained by anyone who has had even a single undergraduate course in economics").

20/ WCS Wireless Opposition at 12.

21/ *Id*.

22/ 47 C.F.R. § 1.948(i).

given Columbia Capital Equity Partners' admission that WCS Wireless LLC's purpose was simply to "acquire and hold spectrum licenses."[23/]

In short, NAB argued in its petition that WCS Wireless "appeared" to be engaged in trafficking because the Applicants had provided almost no information.[24/] But the facts NAB did have access to spoke for themselves. Now that WCS Wireless has had the opportunity to rebut this prima facie case of trafficking, and has not done so, the Commission may reasonably conclude that WCS Wireless is engaged in trafficking.

III. THE COMMISSION CANNOT GRANT THIS APPLICATION UNLESS IT DETERMINES XM'S USE OF THE SPECTRUM WILL BE CONSISTENT WITH THE COMMISSION'S POLICY OF SUPPORTING TERRESTRIAL RADIO.

The Commission has established a clear policy that the public interest is served by maintaining "a vibrant and vital terrestrial radio service for the public."[25/] Thus, the Commission authorized SDARS in 1997 with the express understanding that it was a "national service,"[26/] committed to "monitor and evaluate" its impact, and promised to "take any necessary action to safeguard the important service that terrestrial radio provides."[27/] The Commission took such

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[23/] WCS Wireless License Subsidiary LLC, Ownership Disclosure Filing (Form 602), File No. 0002080061 at Ex. A (submitted Nov. 26, 2003). WCS Wireless has no substantive response to the admissions of its own primary investors. Instead, without offering an explanation, it simply engages in more personal attacks. WCS Wireless Opposition at n.21.

[24/] NAB Petition to Deny at 6-8.

[25/] Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5769 ¶ 33 (1997) ("*SDARS Authorization Order*").

[26/] *Id.* at 5763 ¶ 18.

[27/] *Id*. at 5769 ¶ 33.

action in September 2001 by imposing conditions on the use of SDARS terrestrial repeaters.[28/] And as XM concedes, the Commission also put restrictions on WCS licensees "that protect broadcasters."[29/]

The scant information XM has provided strongly suggests that it plans to provide localized services integrated with its SDARS service in a manner likely to harm terrestrial radio — and hence the important public benefits it provides. XM cannot be permitted to circumvent eight years of consistent Commission policy. The Commission should deny this application if XM does not provide more information to prove that its use of the WCS spectrum will be consistent with Commission law and policy and, therefore, in the public interest. At a minimum, even if XM does eventually carry its burden of proof, the Commission should formulate and impose conditions to prevent XM from evading the Commission's policies. Otherwise, this would be a radical departure from past Commission law and policy and, therefore, inappropriate without opening a new rulemaking.

[28/] The Commission sought to "adequately prohibit local origination of programming" and "ensure that the DARS licensees do not provide local service" — specifically, by restricting repeater use to the "simultaneous retransmission of programming, in its entirety, transmitted by the satellite directly to SDARS subscriber's receivers." Order and Authorization, *XM Radio, Inc. Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters*, 16 FCC Rcd 16781, 16784-85 ¶¶ 10, 11 (2001) ("*SDARS Repeaters STA*"); *see also* NAB Petition to Deny at 5-6. Even more recently, the Commission has again reaffirmed the same policy by requiring that XM's in-store micro-repeaters also be subject to the same condition. *See Request for Special Temporary Authority to Operate In-Store Signal Boosters in the Satellite Digital Audio Radio Service*, International Bureau File No. SAT-STA-20030409-00076 (granted June 26, 2003).

[29/] XM Opposition at 12.

A. The Commission Cannot Grant this Application Because Applicants Have Not Met Their Burden of Proving the Transfer Is Consistent with the Public Interest.

The Applicants bear the burden of proving that the proposed transaction serves the public interest.[30/] Rather than taking this opportunity to supplement the record and explain its plans for the WCS spectrum, however, XM instead recites a laundry list of examples of what *other* companies are doing in other bands.[31/] XM then mischaracterizes NAB's position as being generally opposed to mobile subscription multimedia services.[32/] But NAB does not ask the Commission to prevent the development of such services generally. NAB simply asks the Commission to consider this application in light of its earlier commitment to monitor ongoing developments and take necessary action to ensure that new offerings will not undermine the important services provided by terrestrial radio.

The broad range of proposals cited by XM indicate that XM is intending to provide localized content. The various services cited include the ability to "access to local movie times, traffic, and weather," "easily surf 50 to 100 national and local content channels," watch "home broadcasts" of baseball games, and access "news, weather, and sports information."[33/] These are the type of location-oriented services that the Commission did not believe would be possible

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[30/] 47 U.S.C. § 310(d); Memorandum Opinion and Order, *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-In-Possession, and NextWave Power Partners, Inc., Debtor-In Possession, to Subsidiaries of Cingular Wireless LLC*, 19 FCC Rcd 2570, 2580-81 ¶ 24 (2004).

[31/] XM Opposition at 2-3 & nn.3-10.

[32/] *Id*. at 5-6, 10-11.

[33/] *Id*. at nn.3, 6, 7, 8.

when it authorized SDARS as a "national service." Given this change of circumstances, the Commission must carefully consider whether this transfer will serve the public interest.

XM implies that its service offering (whatever it is) will be innocuous and the Commission should not worry about it because it is "similar" to those planned by a number of mobile phone service companies.[34/] But this misses the crucial point: XM could easily bundle these localized services with XM's SDARS service in an integrated package. Although many other companies' data services plan to provide varying content based on the user's location, none of these companies is poised to integrate a localized data service with a high-quality audio broadcasting service such as SDARS — a service that reaches the same audience served by terrestrial broadcasters. As a result, none of them could circumvent the framework the Commission designed in the SDARS and WCS rulemakings to protect the viability of terrestrial broadcasting. But XM's offering could. Because XM has not even explained whether it intends to offer an integrated, localized service, it has not begun to meet its burden of proving that it intends to abide by Commission policies, let alone that its service would be consistent with the public interest.

Without more information from the Applicants, the Commission cannot know whether approving the transfer would effectively bless an offering that would undermine the important services provided by terrestrial radio. Even WCS Wireless and XM are inconsistent in their descriptions of the service to be provided. WCS Wireless states that there "has been no change in the WCS Wireless business plan for a one-way datacasting service."[35/] By contrast, XM's opposition states that it will use the WCS frequencies to provide "new subscription mobile

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[34/] *Id*. at 10-11.

[35/] WCS Wireless Opposition at 4-5 & Donohue Decl.

multimedia services."[36/] How to reconcile these two different descriptions is anyone's guess. Without more information, the Commission must deny the transfer.

B. Conditions Are Necessary To Protect the Public Interest.

Even if the Commission is eventually persuaded to approve the transaction, conditions are necessary to protect the public interest. XM's examples of "services contemplated at this point" reveal that XM probably does, in fact, plan to provide localized audio and other SDARS-bundled services. XM cannot offer such services without contravening the Commission's prohibition on terrestrial broadcasting on the WCS bands or, as described in NAB's petition to deny, the Commission's SDARS policies designed to protect terrestrial broadcasting.[37/]

First, XM's use of the WCS licenses to provide localized audio programming through terrestrial signals would violate the *WCS Authorization Order*.[38/] XM concedes that the Commission's rules "preclude WCS licensees from providing terrestrial 'broadcasting' service using WCS frequencies."[39/] Yet XM's Opposition strongly suggests that XM is actively considering using the WCS spectrum for terrestrial point-to-multipoint service that is not

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[36/] XM Opposition at ii.

[37/] XM disclaims its intention to use the WCS license for satellite services "at this time." XM Opposition at 14. This is hardly reassuring, and is consistent with XM's practice of providing little information and hedging what information it does provide. Nevertheless, because NAB addressed the SDARS component of XM's possible violations at length in its petition, it will concentrate on XM's new arguments concerning broadcast here.

[38/] Report and Order, *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, 12 FCC Rcd 10785, 10798 ¶ 27 (1997) ("*WCS Authorization Order*").

[39/] XM Opposition at 12.

complementary to its SDARS satellite signal.[40/] Because such a service would violate the Commission's restrictions on the use of the WCS bands, this alone is ample grounds to condition this transfer on XM's compliance with the WCS rules.

XM incorrectly claims that the broadcast restriction is inapplicable to a "wireless subscription multimedia service" simply because it is a "subscription" service rather than a "broadcast."[41/] This is wrong. In *some* circumstances, the Commission has referred to "broadcast" services in order to distinguish them from pay subscription services. But in the *WCS Authorization Order*, the Commission clearly used the term "broadcast" in the more general sense of point-to-multipoint transmissions. Any other reading is nonsensical. XM concedes that the WCS bands could be used for SDARS if it overcomes the technical and logistical hurdles,[42/] but its reading of the word "broadcast" would prohibit XM from offering its subscription service over WCS frequencies: The Commission authorized the WCS band for "fixed, mobile, radiolocation, and audio *broadcasting*-satellite services."[43/] The *Order* also limited satellite services to "the international allocation for part of this spectrum[, which] is for audio *broadcast* satellite services."[44/] By using the term "broadcast" in this context, therefore, the Commission clearly did not mean to distinguish between free and pay services. Indeed, this is the same international allocation that applies to the SDARS band, which XM uses in the United States to

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[40/] If XM were not planning a point-to-multipoint broadcast service, it would have had no reason to vigorously defend its (mistaken) view that subscription services are not "broadcast" in the context of the *SDARS Authorization Order*. XM Opposition at 12-13.

[41/] XM Opposition at 12, 13.

[42/] *Id*. at 14.

[43/] *WCS Authorization Order* at 10798-99 ¶ 28 (emphasis added).

[44/] *Id*. at 10800 ¶ 30 (emphasis added).

provide subscription satellite service. The Commission therefore used the term "broadcast" here in its more common sense — to send a signal on a point-to-multi-point basis.[45/]

Second, NAB is not urging a "line of business" restriction as XM claims[46/] — the Commission's rules and policies apply to all parties, not just XM. But XM and Sirius, as the only SDARS licensees, are unlike Quaalcom and the other companies XM cites in that they are subject to a whole variety of restrictions in the SDARS band. These restrictions include the requirement that repeaters only retransmit the entire signal — a restriction that, as noted above, the Commission imposed specifically to "prohibit local origination of programming."[47/]

In addition, contrary to XM's claims, NAB need not prove that this particular transaction would "threaten the viability" of terrestrial broadcasters. The opposite is true. XM bears the burden of proof here. Therefore, XM must show why this transaction is consistent with the Commission's rules and policies. XM has not done so. Instead it has misstated the law and offered facts that obfuscate its real intention with regard to this spectrum. NAB accordingly urges the Commission to take action, as it promised it would when it authorized SDARS service, by imposing appropriate conditions to protect the important public services that terrestrial radio provides.

[45/] The cases cited by XM are inapposite here. XM Opposition at n.35. These cases all deal with the different distinction between "subscription" versus "broadcast" television services for purposes of regulating content such as advertising and time for political candidates. By contrast, the *WCS Authorization Order* intended to prohibit all non-complementary point-to-multipoint terrestrial signals (pay or not) in the WCS bands to protect local broadcast service and to ensure the service was consistent with the international allocation for those frequencies — not for content regulatory purposes.

[46/] XM Opposition at 15-16.

[47/] *SDARS Repeaters STA*, 16 FCC Rcd at 16784-85 ¶¶ 10, 11.

Finally, even if the premise of XM's argument were true, as an SDARS licensee, XM has accepted certain conditions on its services.[48/] If developments and the growth of other services since 1997 means that the conditions on SDARS licenses are no longer appropriate, XM's remedy is not self-help. Nor, as NAB explained in its petition,[49/] can the Wireless Telecommunications Bureau change a rule or policy in the context of a license transfer application because it would present a new, novel question outside the scope of the Bureau's delegated authority. Until the full Commission considers a reversal and adequately justifies any reversal of policy in a rulemaking, XM and the FCC must abide by the conclusion reached in 1997. It is longstanding Commission policy and practice not to use an adjudicatory license transfer proceeding to reverse the course set in a rulemaking.[50/]

48/ *Id*.

49/ NAB Petition to Deny at 11-14.

50/ *See, e.g.*, Memorandum Opinion and Order, *Sunburst Media L.P.*, 17 FCC Rcd 1366, 1368 ¶ 6 (2002) ("[I]t has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications.") (citing *Application of Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594, 6599 (1999), *Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145, 11148 (1999), *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983)); Memorandum Opinion and Order, *Applications of Rocky Mountain Radio Co., LLP, Assignor, and AGM-Rocky Mountain Broadcasting I, LLC, Assignee*, 15 FCC Rcd 7166, 7167 n.3 ("The appropriate venue for consideration of such an argument would be in a rulemaking proceeding, not an individual adjudication such as the one before us.").

CONCLUSION

For the foregoing reasons, NAB respectfully urges the Commission to deny the application or, at a minimum, to require XM to provide adequate information and impose appropriate conditions on any transfer after sufficient consideration.

Dated: August 24, 2005

Respectfully submitted,

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DECLARATION OF JERIANNE TIMMERMAN

1. I am Associate General Counsel of the National Association of Broadcasters ("NAB").
2. I have read the foregoing Reply to Oppositions to Petitions to Deny the application for transfer of control of licenses from WCS Wireless, Inc. to XM Satellite Radio Holdings, Inc.
3. I have personal knowledge of the facts stated therein sufficient to demonstrate that NAB is a party in interest and sufficient to demonstrate that the grant of the application would be prima facie inconsistent with the public interest.
4. The facts as set forth in the Reply, other than those of which official notice may be taken, are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Jerianne Timmerman

Executed on August 24, 2005.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2005, copies of the foregoing Reply of the National Association of Broadcasters, WT Docket No. 05-256, File No. TC-0002240823, were served via the United States Postal Service upon the following parties:

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Jerianne Timmerman

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Jerianne Timmerman

EXHIBIT A

EXHIBIT 1

Overview

The power and out of band emission limits imposed upon the WCS spectrum provide significant protection to the SDARS band.

WCS Wireless proposes to test the effects of operating an OFDM waveform at an average power of 2KW rather than a peak of 2 KW as currently defined in Part 27. We believe that operating at average power will not cause interference or overload to existing SDARS operators. As part of the ongoing cooperation between WCS licensees and SDARS operators, we have agreed to coordinate our test with the adjacent SDARS operator at our proposed experimental site (See Exhibit 2).

The adjacent operator will closely monitor their network during our experiment to assess any impact that might occur. If a negative impact is noted, operation under the experimental license will cease immediately.

Form 442 Section 10a

WCS Wireless has already completed a multi-site test of the network technology within the current Part 27 power rules. These tests were conducted using custom made equipment that meets current FCC Part 27 requirements. These tests were conducted at a power level of 500 W average power, which was necessitated by the fact that the selected OFDM waveform exhibited a momentary peak power 6 dB higher than the average power.

CW, GSM and FM signals have signals which manifest constant envelopes and are therefore always at peak output. Square Root Raised Cosine (SRRC) modulations like QAM and QPSK produce PDFs that are concentrated in the upper half of the range and have peak to average ratios on the order of 3 to 6 dB. Multiple Carrier Modulation (MCM) such as OFDM produce random phasor sums much like random noise, and therefore have Rayleigh distributed envelopes; i.e., $p(E) = 2E\xi\text{-}V_2\tilde{\xi}$Peak to average ratio $\xi$is 6 dB for the equipment used in this test.

WCS Wireless wishes to gain an understanding of the real world effect of increasing the power by 6 dB, for an average power of 2 KW at each transmitter. We will accomplish this by measuring signal strength and BER over the same areas we have already characterized. In addition to discovering the coverage and quality improvements for the WCS Wireless network, we will also work closely with the neighboring operator to assure that operation at the higher power has no effect on their system. This will be

accomplished by drive tests to compare coverage and quality on their system before and during our experimental license testing.

Form 442 Section 10b

There are two specific objectives of this experimental license:

1). To determine the actual coverage increase provided by the power increase, and

2). To assure that the power increase does not affect the service integrity of the neighboring operator.

Form 442 Section 10c

There is currently an open issue about the effect of increased average power on adjacent spectrum. Data collected under this experimental license will provide empirical evidence, which can illustrate these effects. The test results will be specific to the waveforms and receivers under test, however the data should be valuable beyond this specific instance because these results can be extrapolated to other bands and services.

September 24, 2004

Mr. Scott Donohue
President
WCS Wireless, LLC
2 Jackson Street, Suite 100
San Francisco, CA 94111

Dear Mr. Donohue:

Further to your request for coordination with your Wireless Communications Service ("WCS") test system in Dallas, Texas, and your associated request for experimental authority from the Federal Communications Commission ("FCC"), XM Satellite Radio Inc. ("XM") agrees to coordinate interference measurements during the period indicated. We also agree to the following terms for the test, unless changes are specifically arranged in writing between our companies:

1. A coordinated interference test period starting on October 1, 2004 and ending on October 30, 2004 in Dallas, Texas.

2. Equipment operating under an experimental license will be operated during the hours of 10 pm to 6 am.

3. Operations on the WCS "D" block (2345 - 2350 MHz) only.

4. Operation on up to four transmitter sites for the coordinated interference test period.

5. Testing of transmissions on the WCS frequencies at power levels up to 2000 Watts average power using an OFDM waveform with a 6 dB peak to average ratio.

6. Sharing of coordinated interference test information with XM.

7. WCS Wireless, LLC's operations under the experimental license will cease immediately at the request of XM for any reason.

8. The contact person for the duration of the experimental license will be Scott Donohue, President, WCS Wireless, LLC at the following location:

2 Jackson Street, Suite 100
San Francisco, CA 94111
Tel (415) 391-2234
Fax (415) 391-4912
Cell (415) 987-2234
scott@wcswireless.com

So long as the tests are conducted in accordance with the above parameters, XM does not object to the testing on the grant of experimental authority. You are authorized to transmit this letter to the FCC in conjunction with your application.

Very truly yours,

Lon C. Levin
Vice President